

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

Cruz v. Spencer,

No. 05-10133-NMG

PETITIONER'S MEMORANDUM OF LAW
IN SUPPORT
SHOWING HE IS ENTITLED TO STAY
AND ABEYANCE

Statement Of The Case

After filing a Petition For A Writ Of Habeas Corpus under 28 USC § 2254, the petitioner filed a motion to stay the proceedings in the District Court. On 7/6/05 the Court, Gorton, D.J., issued an order for the petitioner to create a Memorandum of Law why a stay should issue.

Statement Of The Facts

The facts may be found in the petitioner's petition for a writ of habeas corpus and in the motion and affidavit to stay the proceedings. Also: see exhibit 1.

Legal Argument

The District Court has the Authority to issue a Stay base on the exhaustion of REMEDIES IN THE State Court. 28 USC § 2254 (b)(1)(a).

See Rhines v Weber --US--125 Sct 1528 (2005).

There are two concepts involved:

Reduce delay in the execution of sentences (finality) and the State prior to adjudication in the Federal Foun.

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There is a third consideration for issuing the Stay the merits the claim.

Here, the petitioner is currently in the Appeals Court with his criminal Appeal of the motion for New Trial (Exhibit 1,) and there is no indication the petitioner has attempted to cause any delay in the proceeding.

In Rhines, the Court, O'Connor, held in such circumstances, the district Court Showed Stay where his petitione has merit and there is no indication he is involved in intentional dilatory tactic.

It has been held in various Courts that the District Court has the power to control its own docket and therefore has broad discretion to Stay proceeding. Clinton v Jones 520 US 681 (1997)

In a first Circuit case on arbitration decided by the Court at bar herein it was held " Even without explicit Statutory authority to do so, a Court, in its sound discretion, may Stay any case pending before it as an exercise of its inherent power to control its own docket" Bowlby v Carter MFG. Corp. 138 F.Supp 2d 182,188 (2001).

CONCLUSION

For the reason stated above, in fact and Law, this Honorable Court should allow the petitioners motion to Stay until the Commonwealth Rules on petitioner's motion for New Trial (Appeal)

Date: 7/21/05

Respectfully Submitted

Pablo Cruz
Pablo Cruz
Box 43
Norfolk, MA, 02056

I, Pablo Cruz, hereby certify that I mailed a true copy of the above Memorandum to Maura D. McLaughlin, Assistant Attorney General One Bullfinch Place, BOSTON MA 02114

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH SS.

APPEALS COURT

NO. 05-P-0452

Commonwealth of Massachusetts, Appellee

-v-

Pablo Cruz, Appellant

APPELLATE BRIEF

Submitted By:

Pablo Cruz
Box 43,
Norfolk, MA 02056

May 2, 2005

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ISSUE PRESENTED ON APPEAL

WHETHER THE DEFENDANT SHOULD HAVE BEEN ALLOWED
TO CONFRONT THE CHEMIST/ANALYST WHO SWORE UNDER
OATH AS TO THE QUALITY AND QUANTITY OF THE DRUGS
SEIZED BY POLICE?

Argument.....pp. 6-16

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH SS.

APPEALS COURT

No. 05-P-0452

Commonwealth of Massachusetts

-v-

Pablo Cruz

APPELLATE BRIEF

Statement Of The Case

This is an appeal from a judgment of the Plymouth Superior Court, Brady, J., who denied the defendant's motion for new trial, and, on March 17, 2005 issued a MEMORANDUM OF DECISION ON DEFENDANT'S (SECOND) MOTION FOR NEW TRIAL, not on waiver but that the holding in Crawford v. Washington, --US--, 124 S.Ct. 1354 (2004) "does not apply retroactively and thus does not assist the defendant here."

The appellant-defendant filed a timely notice of appeal and is now before this Honorable Court on the issue of whether the defendant has a Constitutional right to confront the Chemist/Analyst on the veracity of the Certificate of Analysis under G.L. 94C §47A.

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Statement Of Facts

On May 8, 1998, a Plymouth County Grand Jury indicted the defendant on one count of Trafficking in 28 grams or more of Cocaine, in violation of G.L. 94C §32E(b)(2) and one count of Trafficking in Cocaine, 200 grams or more in violation of G.L. c. 94C §32E(b)(4). See: docket sheets in Commonwealth v. Pablo Cruz, PLCR98-00919-00920, tried in front of Brady, J., where the defendant was convicted on both counts and sentenced to 15 years in prison total, both sentences concurrent.

Appeal from this conviction was taken October 1999. Appeals Court affirmed in Commonwealth v. Cruz, 54 Mass. App.Ct. 1112 (2002)

The defendant filed a motion for a new trial and for post-conviction discovery in May 2003. The motion was denied and the Appeals Court affirmed the denial. Commonwealth v. Cruz, 62 Mass.App.Ct. 1109 (2004)

It is noteworthy that the original Direct Appeal proffered by appointed counsel, David W. Krumsiek, did raise an issue on the Certificates of Analysis, that

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they had not been "sworn to" by a notary. The Appeals Court corrected the defendant's claimed statutory authority from G.L. c. 111 §13 to G.L. 22C §39, but it is the defendant's claim that these two statutes were combined under the Department of Public Safety in 1996 to make G.L. c. 94C §47A.

In early 1998, State Troopers from the Attorney General's Office were conducting an "undercover" narcotics investigation in Brockton, Massachusetts. The defendant is alleged to have sold drugs to the trooper Jaime Cepero. Similar "buys" were conducted on January 30, 1998 and on February 27, 1998. On January 30, 1998, Trooper Cepero went to the home of an informant (CI) who lived on Pleasant Street in Brockton. The purpose of Cepero's visit to CI was to make the purchase of drugs from the defendant.

CI made a phone call and received a phone call back. A few minutes later, the defendant arrived at CI's home.

After the defendant arrived, CI handed Cepero a small package wrapped in aluminum foil. Cepero inspected the package and found it to contain cocaine of a very high quality.

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Cepero paid the defendant \$900.00 cash for the cocaine and defendant gave Cepero the code #99 on any future contacts. Cepero also gave the defendant his pager number out of New Hampshire.

A surveillance team took the narcotics that Cepero had purchased and later submitted them to the State Police Laboratory for analysis.

At trial, the Commonwealth introduced the bag of cocaine purchased by Cepero and the Certificate of Analysis. (COA) The COA indicated that the powder in the bag was found to contain 80% cocaine, a derivative of coca leaves and a Class B substance, as defined under Chapter 94C §31 of the Massachusetts General Laws. [TT. 1:187] The COA also indicated the weight to be 30.62 grams.

On February 27, 1998, Cepero purchased another amount of cocaine from the defendant in the amount of 462 grams for around \$12,000.00. At that time, Cepero and CI were accompanied by Trooper Alejandro who had brought the money. The defendant was in jail, indicted, and tried on the larger amount as well.

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At trial, the Commonwealth introduced as evidence 5 packets of cocaine purchased from the defendant, along with a Certificate of Analysis. The COA indicated that the rock powder in the bags "was found to contain 29 per cent cocaine, a derivative of coca leaves and a Class B substance, as defined under Chapter 94C, section 31 of the [Massachusetts] General Laws ...the cocaine was present in its free base for commonly referred to as crack." The COA also indicated that the five bags of "off-white powder" cocaine weighed 456.97 grams. [TT. 1:220]

Defendant pleaded not guilty to all of the charges and testified to an alibi, i.e., that he was at his job at BFI for the perior in question.

These facts are presented in the light most favorable to the Commonwealth. Commonwealth v. Latimore, 378 Mass. 671 (1979) It should be noted here, by way of fact, that the Appeals Court in Commonwealth v. Pablo Cruz 54 Mass. App.Ct. 1112 (2002) found "Both certificates contain the notary public signature and the representation that they were sworn and subscribed to before me." The Appeals Court called the COAs "affirmations."

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Legal Argument

ISSUE#1: THE DEFENDANT WAS NOT ALLOWED
TO CONFRONT THE CHEMIST/ANALYST WHO
SWORE UNDER OATH AS TO THE QUALITY AND
QUANTITY OF THE DRUGS SEIZED BY POLICE

The Certificates of Analysis were introduced at the defendant's trial to authenticate the amount and quality of Cocaine involved in this case. The introduction of this evidence shows the analysts affirmed under oath about the weight and percentage of cocaine found in the mixture.

By statute, these documents are sworn to as being authentic either before a Justice Of The Peace or a Notary Public. G... c. 94C §47A appears to have superceded G.L. c. 111 §13 and G.L. c. 22C §39. The certificate(s)

"Shall be prima-facie evidence of the composition and quality of such controlled substances of narcotic drugs when introduced as evidence before a grand jury or any court proceeding in the Commonwealth." Id.

See: Commonwealth v. Villella, 39 Mass.App.Ct. 426, 430 (1995)

In 2004 the United States Supreme Court decided Crawford v. Washington, --US--, 124 S.Ct. 1354 (2004)

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which revisited the legal landscape regarding the confrontation of witnesses who made "out of court statements, characterized by the Court as a core class of "testimonial" statements such as "ex parte in-court testimony or its functional equivalent - that is material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." *Id.*, 1364

Justice Scalia stated in Crawford:

[W]e once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon "the law of Evidence for the time being." 3 Wigmore §1397 at 101; accord, Dutton v. Evans, 400 U.S. 74, 94, 91 S.Ct. 210, 27 L.E.D. 2d 213 (1970)(Harlan, J., concurring in result). Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court. *Id.*, 1364.

The framers of the 6th Amendment surely wished to safeguard those common law rights they possessed in 1791. as a foundation for fairness. They were reacting to

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and wanted to get rid of prior laws by which the government would prescribe by statute instruments that the government could use to gather evidence ex parte, "certify the results" and then use it against individuals. *Id.*, 1360.

The Certificate of Analysis created by statute in the Commonwealth and used by the prosecutor to determine the weight and quality of drugs is no different. And, that weight determines the defendant's sentence as well.

The trial Court, Brady, J., denied the defendant's motion because "Crawford does not apply retroactively..." [MEMORANDUM OF DECISION ON DEFENDANT'S (SECOND) MOTION FOR NEW TRIAL, p. 1]

This was an abuse of discretion by the Court, coupled with the fact the defense of miscalculation on the quality and quantity of the drugs involved was not available to the defendant in the constitutional sense based on the statutory construction of the COA law(s). See: DeJoinville v. Commonwealth, 381 Mass. 246 (1980) (Built-in excuse on failure to raise the issue in the ordinary course.) See also: Commonwealth v. Marrone, 387 Mass. 702 (1982) (The offending statute may be struck, and keep the remainder.)

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On the issue of retroactivity, surrounded by Federal Law, the "threshold question" is whether the defendant seeks to apply a rule of law that was "clearly established" at the time his trial took place. Williams v. Taylor, 529 US 362, 403 (2000) This principle, as stated in Williams, "bears only a slight connection" to the non-retroactivity paradigm put forth in Teague v. Lane, 489 US 288 (1989), and those cases which ensued from Teague, except to the extent that "whatever would qualify as an old rule under our Teague line of cases will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States.'" Williams, 412.

The US Supreme Court has not found it easy in deciding whether a rule is "old" or "new" for retroactivity purposes. A "new" rule is one which "breaks new ground or imposes a new obligation on the States or Federal Government." Id.

The trial Court, Brady, J., stated that the Crawford supra, decision does not apply retroactively... That would be true, because it is not a "new" rule. It is clearly established old State and Federal law.

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The defendant is guaranteed by Article XII of the Massachusetts Declaration of Rights to meet the witnesses against him "face to face." Commonwealth v. Buckley, 410 Mass. 209, 221 (1991) Article 12's right of confrontation prevents the prosecution from presenting "witnesses" who "testify" outside the physical presence of the defendant and the jury. Commonwealth v. Bergstrom, 402 Mass. 534 (1988)

On the Federal level, the 6th Amendment of the United States Constitution's Confrontation Clause is explained somewhat 12 years ago in White v. Illinois, 502 US 346 (1992) by Justice Thomas who provided background for the Crawford decision in 2004.

In discussing what is a "witness," in terms of the 6th Amendment, the Court stated the noun "witness" - in 1791 as today - could mean either a) one 'who knows or sees anything; one personally present' or b) 'one who gives testimony' or who 'testifies' i.e., [I]n judicial proceedings, [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of

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some fact to a court' 2 N.Webster An American Dictionary
Of The English Language (1828)

The Court [quoted] Mattox v. United States, 156 US 237,
242 (1895):

"The primary purpose of the [Confrontation Clause]
was to prevent depositions or ex parte affidavits, such as
were sometimes admitted in civil cases, being used against
a prisoner in lieu of a personal examination and cross-
examination of the witness..." Id.

This would preclude "trial by affidavit" White, 362.,
thereby making the reliability of the Certificates of
Analysis a due process of law issue. The White Court also
found that the Confrontation Clause speaks to the "witnesses
against him." Who could be more "against" him than the
Chemist/Analyst who controls the length of his sentence,
which is mandatory. Whether it's a difference of 199 grams
or 200 grams is a matter of 5 years in prison.

Justice Thomas in White, spoke of "depositions." Id.,
365. Certainly the chemist/analyst's "sworn-to" certificate
is presented in the spirit and sense of a deposition.

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• The trial Court, Brady, J., held that "the substance of such certificates are rarely in issue, and it would be highly inconvenient and inefficient to require the presence of the chemist in every drug prosecution in the Commonwealth."

This decision is a decision which is contrary to and an unreasonable application of clearly established state and federal law. The Supreme Judicial Court and the US Supreme Court are unanimous in their agreement that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is is this state and the country's constitutional goal.

Commonwealth v. Tanso, 411 Mass. 640, 650 (1992)

Certificates of Analysis, whether they are produced under G.L. c. 111 §13, G.L. c. 22C §39, or G.L. c. 94C §47A, are essentially and primarily affidavits. In People v. Rogers, 780 NYS 2d 393, 396 (NY A.D. 3 Dept. 2004) [cited as] 8 AD 3d 888, the New York Appellate Court held that admitting the report of a victim's blood alcohol level, requested by the government and used towards the element of consent in a rape case, violated the 6th Amendment, and citing Crawford v. Washington, supra, the Court stated:

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"Documents prepared for litigations lack the indicia of reliability necessary to invoke the business records exception to the hearsay rule....because the test was initiated by the prosecution and generated by the desire to discover evidence against the defendant, the results were testimonial."

By statute, the chemist/analyst makes a "solemn declaration under oath" White, supra, which has been decreed to be "prima facie" evidence which is evidence [sufficient to establish a fact or raise a presumption unless disproved or rebutted.] Black's Law Dictionary, 8th Ed. 2004.

As stated in his Superior Court Memorandum of Law, Whether the COA falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness" depends on whether the 6th Amendment or Art. XII of the Mass. Declaration Of Rights trumps the statute and its Legislative intent. That intent may be governed by G.L. c. 94C §48 which appears to be a "severability" clause which saves the rest of the statute, not in conflict with the state or federal Constitution.

See: Baird v. Eisenstadt, 429 F.2d 1398 (1970)

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To answer the defendant-appellant's question of whether he had a constitutional right to confront the chemist/analyst during his trial, and because Crawford v. Washington, --US--, 124 S.Ct. 1354 (2004) relies on US Supreme Court precedent that predates the defendant's state trial, it can be applied to overturn his conviction.

This question of retroactivity posited by the trial Court, Brady, J., is answered by the question of whether a rule is old or new requires Courts to make an independent view of each case. Wright v. West, 505 US 277, 305 (1992) [O'Connor, J., concurring in judgment). In accord with the Federal rule for collateral relief, both federal and state courts may rely on the precedents of the Supreme Court in conducting that view.

Teague outlines a 3-step analysis for determining whether the "nonretroactivity" principle prevents a collateral movant's reliance on a particular rule. 1st, the reviewing Court must determine when the defendant's conviction became final. 2nd, the Court must survey the legal landscape to determine whether or not the case in question announced a rule of constitutional law. 3rd, if it is determined that the case did announce a new rule, the reviewing Court must

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consider whether it fits into one of the two exceptions to nonretroactivity. Caspari v. Bohlen, 510 US 383, 390 (1994)

There is no dispute that in this case that the final adjudication of the defendant's conviction predates Crawford. The two exceptions to Teague's new rule bar are not applicable here. Thus, for purposes of this appeal, this Honorable Court need only focus on Step 2, i.e., reviewing the legal landscape to determine whether the 6th amendment has always required unavailability and a prior opportunity for cross-examination when the admissibility of testimonial evidence is at issue. Beard v. Banks, --US--, 124 S.Ct. 2504, 2510 (2004)) Williams, 529 US @ 412.

In Crawford, the Court addressed the question of whether the State's use of the testimonial statement of a witness who did not testify in person and had never been subject to cross-examination violated the Confrontation Clause. Id., 1359.

This proposition, that a criminal defendant has a constitutional right to confront his accusers, was hardly novel during the defendant's trial.

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Stated another way, the Supreme Court cases that underlie Crawford, "have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." Id., 1369.

In sum, it must be held that Crawford's application of the Confrontation Clause did not forge new ground or otherwise impose a new obligation upon the State in announcing a defendant's constitutional right to confront his accusers, here, the chemist/analyst. As such, Crawford's holding is an old rule and should have been applied in his trial.

Conclusion

For all of the reasons stated above in fact and law, the Court's denial of a new trial must be reversed and the case remanded to the Superior Court.

May 2, 2005

Respectfully submitted,

Pablo Cruz

Pablo Cruz

Box 43, Norfolk, MA 02056

Certificate of Service

I, Pablo Cruz, hereby swear under pains and penalties of perjury that I mailed 2 true copies of the above Appellate Brief to the District Attorney Of Plymouth County 32 Belmont Street, Brockton, MA 02403-1665 by first class mail by depositing it in the institution mailbox, postage prepaid, on May 2, 2005.

/s/ *Pablo Cruz*
Pablo Cruz

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH SS.

A.C.# 05-P- 0452

Commonwealth of Massachusetts, Appellee

-v-

Pablo Cruz, Appellant

RECORD APPENDIX

Submitted By:

Pablo Cruz
Box 43,
Norfolk, MA 02056

May 2, 2005

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Notice of Appeal.....	1
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Francis R. Powers
Clerk of the Courts
Plymouth Superior Court
72 Belmont Street
Brockton, MA 02301

Pablo Cruz
Box 43,
Norfolk, MA 02056

March 29, 2005

RE: Commonwealth v. Cruz,

No. 100919

Dear Mr. Powers:

This is to send you NOTICE OF APPEAL, pursuant to
Mass.R.App.P. 3(a), to appeal the decision of the
Court, Brady, J., who, on March 17, 2005 denied the
defendant's Motion For New Trial.

There are no transcripts in this matter.

Sincerely,

Pablo Cruz

copy

RA 1

SUPERIOR COURT, CRIMINAL

INDICTMENT NO. 100919

COMMONWEALTH

VS.

PABLO CRUZ a/k/a Plah
Brockton

RAA

OFFENSE	PLACE	PRESIDING JUSTICE	COURT REPORTER
fficking in controlled substance caine) (.8 grams or more)	Brockton		

COUNSEL FOR COMMONWEALTH

COUNSEL FOR DEFENDANT

vid Breen

J. Thomas Kerner, Boston
David W. Krumsiek, Newton

DATE	NO.	DOCKET ENTRIES
8	1	Returned into court and ordered filed.
27	2	Notice of assignment of counsel
	3	Appearance of D. Breen for the commonwealth Pleads Not Guilty
		Ordered to recognize in the sum of \$500,000 CASH without prejudice
	4	Defendant notified of bail rights under chapter 276, section 58 Special mittimus on indictment issued
		Case continued to June 11, 1998 for pre-trial conference and bail hearing (Chin, J)
		Special mittimus on indictment returned with service
8	5	Pre-trial conference report filed
11	6	Def't's motion for a bill of particulars
19	7	Def't's motion for production of police reports
	8	Def't's motion to inspect physical evidence
	9	Def't's motion for production of statements
	10	Def't's motion for statements of co-def'ts

IX B

SA0055

DOCKET ENTRIES - (CONTINUED)

Deft's motion to be furnished with statements of promises, rewards or inducements given to Commonwealth's witnesses

Deft's motion for production of exculpatory evidence

Case continued to July 13, 1998 by agreement for motions (Chin, J) C. Tinkham, court reporter

Case continued to August 26, 1998 by agreement for motions (King, J) B. StCharles, court reporter

Attorney Murphy's motion to withdraw

Appearance of D. Asack for the defendant

Case continued to September 28, 1998 by agreement for pre trial conference (King, J) K. Lindelof, court reporter

Pre-trial conference report filed

Case cont. to Nov. 3, 1998 by agreement (Doerfer, J.) B. St. Charles, court reporter

Case cont. to Dec. 10, 1998 by agreement for trial assignment (Hely, J.) S. Bates, court reporter

Case cont. to Jan. 19, 1999 by agreement for trial assignment (DelVecchio, J.) R. Griffin, court reporter

Attorney Asack's motion to withdraw

Attorney Asack's motion to withdraw

Case cont. to March 8, 1999 by agreement for trial (Walsh, AC/M) R. Griffin, court reporter

Case continued to April 12, 1999 by agreement for trial (J. Walsh, AC/M)

Case continued to May 25, 1999 by agreement for trial (Ball, J) S. Bates, court reporter

Attorney Asack's motion to withdraw

Case continued to May 25, 1999 by agreement for motion (J. Walsh, AC/M) S. Bates, court reporter

Case continued to May 27, 1999 for hearing RE: Counsel (Doerfer, J) S. Bates, court reporter

Case continued to June 3, 1999 by agreement for status of counsel (Doerfer, J) S. Bates, court reporter

Defendant's motion to file motion to produce informant; allowed

Defendant's motion to produce informant

Appearance of J. Kerner for the defendant

Attorney Asack's motion to withdraw; allowed (See #16)

Attorney Asack's motion to withdraw; allowed (See #17)

Attorney Asack's motion to withdraw; allowed (See #18)

Case continued to June 23, 1999 for motions and trial assignment

EXB

SUPERIOR COURT, CRIMINAL

INDICTMENT NO. 109919

COMMONWEALTH

VS.

PABLO CRUZ a/k/a PLAH

DATE	NO.	DOCKET ENTRIES
September 25	22	Commonwealth's response to defendant's motion for leave to file motion and motion to produce confidential informant.
July 6		Deft's motion to produce informant, after hearing, taken under advisement
July 8	23	Case continued to July 8, 1999 for trial assignment (Hely, J.)
		Deft's motion to produce informant, allowed (see memorandum of decision)
		Memorandum of decision and order on motion to produce informant
		Case continued to August 2, 1999 for trial (Hely, J.)
September 7	24	Deft's motion for Voir Dire with trial judge re: Informant discovery, no action taken
October 20		motion reserved for the trial judge.
		(DelVecchio, J.)
	25	Defendant's oral motion for funds for private investigator, allowed in the amount of \$500.
	26	Defendant's jury voir dire questions, filed
	27	Defendant's motion in limine: defendant's criminal record, filed
	28	Defendant's motion in limine: search of 282 Grove Street (see records for disposition)
	29	Defendant's motion in limine: Cross examination of defendant (see record for disposition)
	30	Commonwealth's opposition to the defendant's motion in limine: search of 282 Grove Street, filed
		Jury of 15 members impanelled
		Defendant's oral motion for mistrial, denied
		(Brady, J.)
October 21	31	Defendant's motion to pay investigator, filed and allowed in the amount of \$500. defendant's oral motion allowed previously on October 20, 1999
		Defendant's oral motion for required finding of not guilty, denied
October 22	32	Defendant's oral motion for mistrial, denied
		(Brady, J.) R. Griffin, court reporter
		Verdict of Guilty
		Sentenced to 5 years to 5 years and 1 day M.C.I. Cedar Junction concurrent with
		sentence imposed on 100920 (415 days credit)
	33	Clerk's written statement under S.C. Rule 65
		Defendant notified of right to appeal case
		Defendant notified of right to appeal sentence within 10 days
	34	Warrant for commitment
	35	Abstract sent to Registry of Motor Vehicle
		(Brady, J.) R. Griffin, court reporter
October 26	36	Deft's notice of appeal filed
	37	Motion of counsel to withdraw

EXB

SA0036

DOCKET ENTRIES - (CONTINUED)

DATE	NO.	
October 26	38	Notice to Justice, DA and counsel of notice of appeal
October 26	39	Clerks certificate that transcript has been ordered from R. Griffin
		Attorney Kerner's motion for leave to withdraw; Allowed, refer to CPCs for appointment of Appellate Counsel (See
	40	Notice of assignment of counsel
		(Brady, J.)
October 8	41	Defendant's pro se notice of appeal from sentence to MCI Cedar Junction
November 1	42	Notice to Administrative Justice, Justice, Clerk of the Appellate Division and counsel of defendant's pro se notice of appeal from sentence to MCI Cedar Junction
December 9	43	Notice-assignment of counsel CPCs
December 20, 2000	44	Appearance of D. Krumsiek for the defendant
May 18		Transcript (3 volumes) received from R. Griffin
June 1	45	Notice to D.A. and counsel that transcript is available (3 volumes)
June 6	46	Clerk's certificate that defense counsel has received copy of transcript (3 volumes)
June 15	47	Clerk's certificate that District Attorney has received copy of transcript (3 volumes)
June 29	48	Defendant's pro se motion for return of property
June 30		Defendant's pro se motion for return of property, the Commonwealth may have until July 24, 2000 to respond. Refer to First Session Judge
		(Brady J.)
July 10	49	Record on appeal transmitted to Appeals Court
	50	Notice to District Attorney and counsel that record on appeal has been transmitted to Appeals Court
July 14	51	ORDER (APPELLATE DIVISION): Appeal withdrawn
July 21	52	Defendant's pro se motion to compel production of bank records
July 24	53	Notice to Justice, District Attorney and defendant of defendant's pro se motion to compel bank records
July 24	54	Commonwealth's opposition to defendant's motion for return of property
October 10	55	Defendant's pro se motion for the return of certain articles seized by police denied without prejudice
		Defendant may renew the motion when the appellate process is concluded (filed with Judge Brady)
	56	Defendant's pro se motion for the return of currency in the amount of eight thousand one hundred and twenty dollars denied without prejudice. Defendant may renew motion when the appellate process is concluded (filed with Judge Brady)
		(Brady J.)
November 9	57	Defendant's pro se motion for discovery
November 15		Defendant's pro se motion for discovery denied, defendant is represented by counsel
		(Brady J.)

EX B

SUPERIOR COURT, CRIMINAL

INDICTMENT NO. 100920

COMMONWEALTH

VS.

PABLO CRUZ a/k/a Plah
Brockton

OFFENSE	PLACE	PRESIDING JUSTICE	COURT REPORTER
Trafficking in controlled substance Cocaine (200 grams of more)	Brockton		
COUNSEL FOR COMMONWEALTH			
David B. Ben		J. T. Kerner, Boston David W. Krumsiek, Newton	
COUNSEL FOR DEFENDANT			
DATE	NO.	DOCKET ENTRIES	
1998			
May 8	1	Returned into court and ordered filed.	
MAY	2	Notice of assignment of counsel (See 100919) Pleads Not Guilty Ordered to recognize personally in the sum of \$100; did so recognize Defendant notified of bail rights under chapter 276, section 58 Case continued to June 11, 1998 for pre-trial conference and bail hearing (Chin, J.)	
June 11		Pre-trial conference report filed (See 100919)	
June 1		Def't's motion for a bill of particulars (see 100919)	
		Def't's motion for production of police reports (see 100919)	
		Def't's motion to inspect physical evidence (see 100919)	
		Def't's motion for production of statements (see 100919)	
		Def't's motion for statements of co-defts' (see 100919)	
		Def't's motion to be furnished with statements of promises, rewards or inducements given to Commonwealth's witnesses (see 100919)	
		Def't's motion for production of exculpatory evidence (see 100919)	

EXB

DATE	NO.	DOCKET ENTRIES - (CONTINUED)
July 1		Case continued to July 13, 1998 by agreement for motions (Chin, J.) C. Tinkham, court reporter
August 11		Case continued to August 26, 1998 by agreement for motions (King, J.) B. StCharles, court reporter
August 23		Case continued to September 28, 1998 by agreement for pre trial conference (King, J.) K. Lindelof, court reporter
September 28		Pre-trial conference report filed (see 100919)
		Case cont. to Nov. 3, 1998 by agreement (Doerfer, J.) B. St. Charles, court reporter
November 3		Case cont. to Dec. 10, 1998 by agreement for trial assignment (Hely, J.) S. Bates, court reporter
December 10		Case cont. to Jan. 19, 1999 by agreement for trial assignment (DelVecchio, J.) R. Griffin, court reporter
1999		
January 19		Case cont. to March 8, 1999 by agreement for trial (Walsh, AC/M) R. Griffin, court reporter
March 8		Case continued to April 12, 1999 by agreement for trial (J. Walsh, AC/M)
April 12		Case continued to May 25, 1999 by agreement for trial (Ball, J.) S. Bates, court reporter
May 30		Case continued to May 25, 1999 by agreement for motion (J. Walsh, AC/M) S. Bates, court reporter
May 2		Case continued to May 27, 1999 for hearing RE: Counsel (Doerfer, J.) S. Bates, court reporter
May 2		Case continued to June 3, 1999 by agreement for status of counsel (Doerfer, J.) S. Bates, court reporter
June 3		Defendant's motion to file motion to produce informant; allowed (See 100919)
		Defendant's motion to produce informant (See 100919)
		Case continued to June 23, 1999 for motions and trial assignment (Doerfer, J.) S. Bates, court reporter
June 25		Commonwealth's response to defendant's motion for leave to file motion and motion to produce confidential informant. (see 100919)
July 6		Def't's motion to produce informant, after hearing, taken under advisement
		Case continued to July 8, 1999 for trial assignment (Hely, J.)
July 8		Def't's motion to produce informant, allowed (see memorandum of decision)
		Memorandum of decision and order on motion to produce informant (see # 100919)
		Case continued to August 2, 1999 for trial (Hely, J.)

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EXB

SUPERIOR COURT, CRIMINAL

INDICTMENT NO. 100920

COMMON WEALTH

VS. PABLO CRUZ aka PLAH

BRACKTON

DOCKET ENTRIES

SA00400

NO.

DATE

tember 7 Deft's motion for Voir Dire with trial judge re: Informant discovery, no action taken
 Defendant's oral motion for the trial judge (see 100919)
 Defendant's oral motion for funds for private investigator, allowed
 Defendant's jury voir dire questions, filed (see 100919)
 Defendant's motion in limine: defendant's criminal record, filed (see 100919)
 Defendant's motion in limine: search of 282 Grove Street (see records for disposition) (see 100919)
 Defendant's motion in limine: Cross examination of defendant (see record for disposition) (see 100919)
 Commonwealth's opposition to the defendant's motion in limine: search of 282 Grove Street, filed (see 100919)
 Jury of 15 members impanelled (see 100919)
 Defendant's oral motion for mistrial, denied (Brady, J.)
 Defendant's motion to pay investigator, filed and allowed in the amount of \$500, defendant's oral motion allowed previously on October 20, 1999 (see 100919)
 Defendant's oral motion for required findings of not guilty, denied
 Defendant's oral motion for mistrial, denied (Brady, J.)
 R. Griffin, court reporter
 Verdict of Guilty
 Sentenced to 15 years to 15 years and 1 day M.C.I. Cedar Junction (415 days credit)
 \$60 Victim Witness Fee
 \$150 Drug Assessment Fee
 Clerk's written statement under S.C. Rule 65 (see 100919)
 Defendant's notified of right to appeal (see 100919)
 Defendant notified of right to appeal sentence within 10 days
 Warrant for commitment (with order for assessments)
 Abstract sent to Registry of Motor Vehicles (Brady, J.)
 R. Griffin, court reporter
 Deft's notice of appeal filed (See 100919)
 Motion of counsel to withdraw (See 100919)
 Notice to Justice, D.A. and counsel of notice of appeal (See 100919)
 Clerks certificate that transcript has been ordered from R. Griffin (See 100919)
 Attorney Kerner's motion for leave to withdraw; Allowed, refer to CPCS for appointment of Appellate Counsel (See 100919)
 Notice of assignment of counsel (See 100919)
 (Brady, J.)
 Defendant's pro-se notice of appeal from sentence to MCI Cedar Junction (See 100919)
 Notice to Administrative Justice, Justice, Clerk of the Appellate Division and counsel of defendant's pro-se notice of appeal from sentence to MCI Cedar Junction (See 100919)

EX B

October 21

October 22

October 26

October 26

October 26

October 28

November 1

DATE	NO.	DOCKET ENTRIES - (CONTINUED)
1999		Notice of assignment of counsel (CPCS) (see 100919)
ember 9		
2000		
bruary 2	5	Victim witness fee paid
	6	Drug assessment fee paid
2000		
ay 18		Transcript (3 volumes) received from R. Griffin
une 1		Notice to D.A. and counsel that transcript is available (3 volumes) (See 100919)
une 15		Clerk's certificate that District Attorney has received copy of transcript (3 volumes) (see 100919)
une 29		Defendant's pro se motion for return of property (see 100919)
une 30		Defendant's pro se motion for return of property, the Commonwealth may have until July 24, 2000 to respond. Refer to the First Session Judge (see 100919)
		(Brady J.)
uly 10		Record on appeal transmitted to Appeals Court (see 100919)
		Notice to District Attorney and counsel that record on appeal has been transmitted to Appeals Court (see 100919)
uly 14		ORDER (APPELLATE DIVISION): Appeal withdrawn (see 100919)
uly 21		Defendant's pro se motion to compel production of bank records (see 100919)
uly 24		Notice to Justice, District Attorney and defendant of defendant's pro se motion to compel blank records (see 100919)
uly 24		Commonwealth's opposition to the defendant's motion for return of property (see 100919)
ctober 30		Defendant's pro se motion for the return of certain articles seized by police denied without prejudice
		Defendant may renew the motion when the appellate process is concluded (Filed with Judge Brady) (100919)
		Defendant's pro se motion for the return of currency in the amount of eight thousand one hundred and twenty dollars denied without prejudice. Defendant may renew motion when the appellate process is concluded (filed with Judge Brady) (see 100919)
		(Brady J.)
ember 9		Defendant's pro se motion for discovery (see 100919)
ember 15		Defendant's pro se motion for discovery denied, defendant is represented by counsel (see 100919)
		(Brady J.)

EXB

SA0041

54 Mass.App.Ct. 1112, 766 N.E.2d 128 (1998), 2002 WL 503007 (Mass.App.Ct.)

Unpublished Disposition

NOTICE: THIS IS AN UNPUBLISHED OPINION.

Appeals Court of Massachusetts.

COMMONWEALTH

v.

Pablo CRUZ.

No. 00-P-1150.

April 16, 2002.

By the Court (JACOBS, KANTROWITZ, & KAFKER, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1 After a jury trial in the Plymouth Superior Court, the defendant was convicted on indictments charging trafficking in cocaine in an amount over twenty-eight grams and trafficking in cocaine in an amount over two hundred grams. On appeal, the defendant claims as error (1) the admission of two certificates of analysis that he contends were not properly "sworn to," (2) the denial of his motion for a required finding of not guilty, (3) the denial of his request for a voir dire of the jury venire as to whether they had any bias or prejudice related to the use of an alias, (4) the judge's reminder at the conclusion of the government's case that a wallet had only been admitted de bene, prompting the prosecutor to elicit testimony that permitted its introduction, and (5) the denial of the defendant's motion for a mistrial because some of the cocaine he was charged with selling had changed in form. The jury could have found that on January 30, 1998, and February 27, 1998, State Trooper Cepero, working undercover, purchased from the defendant approximately thirty-one grams of cocaine and 456 grams of cocaine, respectively. The certificate of analysis for the first purchase was dated March 1, 1998, and was notarized on March 4, 1998. The certificate of analysis for the second purchase was dated March 10, 1998, and was notarized on March 12, 1998.

1. *Certificate of analysis.* The defendant claims the certificates should not have been admitted because the evidence demonstrates that the chemist did not swear to them in the presence of a notary public, contrary to statutory requirements in G.L. c. 111, § 13. We initially note that, because the analysis was done by a State police department chemist, G.L. c. 22C, § 39, and not G.L. c. 111, § 13, is applicable to this case. G.L. c. 22C, § 39, inserted by St.1991, c. 412, § 22, reads, "A certificate by a chemist of the department of the result of an analysis made by him of a drug furnished him by a member of the state police, signed and sworn to by such chemist, shall be prima facie evidence of the composition, quality and when appropriate, net weight of any mixture containing such drug." While G.L. c. 22C, § 39, states a chemist need only sign and swear to the certificate, two additional statutes are relevant. General Laws c. 4, § 6, cl. 6, states that "[w]herever any writing is required to be sworn to or acknowledged, such oath or acknowledgment shall be taken before a ... notary public, or such oath may be dispensed with if the writing required to be sworn to contains or is verified by a written declaration under the provisions of section one A of chapter two hundred and sixty-eight." General Laws c. 268, § 1A, states that "[n]o written statement required by law shall be required to be verified by oath or affirmation before a magistrate if it contains or is verified by a written declaration that it is made under the penalties of perjury."

Reading these three statutes together, it is clear that a State police department chemist's signature can be verified either by a written declaration that it is made under the penalties of perjury or by being sworn to before a notary public. The State police in this case opted to have the certificates notarized. We therefore address the issue raised by the defendant on appeal, that is, whether the certificates should be stricken for failure to satisfy the requirement that certificates be signed "before" a notary public.

***2 Both certificates contain the notary public signature and the representation that they were "sworn and subscribed to before me." As this court has previously recognized, such affirmations are not to be taken lightly, as they are subject to G.L. c. 267, § 1, which makes proffering false evidence a felony. See Commonwealth v. Johnson, 32 Mass.App.Ct. 355, 356-57 (1992).

The defendant contends, nevertheless, that the certificates should be deemed noncompliant with the requirement that they be sworn to before the notary, and therefore should be stricken, because one date is typed on the top of the document and a different date is written into the jurat. We conclude that the different dates alone do not require striking the certificates. See Commonwealth v.

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Westerman, 414 Mass. 688, 700 (1993); Commonwealth v. Villella, 39 Mass.App.Ct. 426, 430 (1995). Rather, the trial judge appropriately adopted the approach utilized in cases in which similar questions have been raised regarding the validity of certificates: instead of striking the certificates, he allowed in evidence both the certificates and the evidence questioning their validity.

In Commonwealth v. Westerman, 414 Mass. at 699-700, the defendant asserted that the judge should not have admitted in evidence a certificate by the Department of Public Safety chemist because the results of the chemist's analysis had not been sent to the Department of Public Health, as was required by the statute in effect at that time. In rejecting this argument, the court held that the "language of [the statute requiring that results be sent to the Department of Public Health] is a species in a family of statutory provisions that establish certificates of analysis as prima facie evidence of the composition and quantity of the substance analyzed. As such, the chemist's certificate is rebuttable evidence and not conclusive proof.... Thus, any procedural or administrative errors affect only the weight of the evidence." *Id.* at 700. (Citations omitted.)

Similarly, in Commonwealth v. Villella, 39 Mass.App.Ct. at 430, the defendant moved to strike the certificates on the ground that the chemist who undertook the analysis was alleged to have "tampered with evidence or given false analysis" in other cases. We concluded that "[e]ven if the defendant had been able at trial to substantiate this representation with proof and to demonstrate its probative value, the appropriate remedy would not have been to strike the certificates but to allow this evidence to be introduced at trial to rebut the prima facie effect of the certificate of analysis under G.L. c. 22C, § 39." *Ibid.*

In the instant case, the different dates on the certificate, as well as unattested copies given the defense during discovery, were introduced in evidence. The jury was also properly instructed on the term "prima facie" and the Commonwealth's burden of proof beyond a reasonable doubt on each element of the offenses, including that the substance purchased from the defendant on each occasion was cocaine and the amounts were over twenty-eight grams for one count and over two hundred grams for the other. In these circumstances, the trial judge properly admitted the chemist's certificates and left to the jury the question of their validity.

****3 2. Motion for required finding of not guilty.** The defendant also argues that the trial court erred in denying his motion for a required finding of not guilty because without the certificates of analysis the Commonwealth could not prove beyond a reasonable doubt either that the substance in question was cocaine or that the weight of the controlled substance equaled or exceeded the amount charged in each indictment. The defendant also argues that because the substance recovered during the controlled buys had changed form by the time it was introduced in evidence, the weaknesses of the case were exacerbated.

As explained above, the certificates of analysis were properly admitted. There was also testimony by Trooper Cepero, the undercover police officer, who examined, and at least in regard to the February 27, 1998, transaction, field tested and weighed the cocaine at the time of purchase. Finally, the change in form of the cocaine was fully explored at trial and, viewed in the light most favorable to the Commonwealth, did not detract from the clear chain of custody that established it was the contraband purchased from the defendant. The trial court's denial of the defendant's motion for a required finding of not guilty was therefore entirely proper.

3. Voir dire request. The defendant also argues that the judge should have questioned prospective jurors regarding whether they harbored any bias or prejudice toward someone who used an alias. We conclude that the trial judge did not abuse his discretion by refusing to question prospective jurors on this issue. See Commonwealth v. Chretien, 383 Mass. 123, 134 (1981).

4. Trial judge's reminder to the prosecution. The defendant next argues that the judge improperly adopted the role of an advocate when he reminded the prosecutor, after the prosecutor had examined his last witness but before he rested, that the defendant's wallet had only been admitted de bene. The prosecutor thereafter elicited the necessary testimony and had the wallet admitted in evidence over the defendant's objection and motion for mistrial.

A trial judge has broad discretion to control the flow of the evidence at trial. See Commonwealth v. Wood, 302 Mass. 265, 267-268 (1939) (trial judge has discretion to permit a party to present evidence after it has rested); Commonwealth v. Shine, 398 Mass. 641, 656 (1986) (judge advised prosecution to recall witness after close of prosecution's case). This single time-saving reminder to the prosecutor, outside of the presence of the jury, did not constitute an abuse of discretion.

5. Motion for mistrial. The defendant's final argument concerns the judge's denial of his motion for mistrial, which was based on the fact that some of the drugs purchased had changed into a brown, semi-liquid form. A trial court's decision on a motion for a mistrial "rests within the sound discretion

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of the trial judge. Commonwealth v. Gordon, 422 Mass. 816, 827 (1996). The judge did not abuse his discretion where the drugs were still in the bag that had been sealed at the laboratory at which they had been tested and no issue was raised concerning the chain of custody.

***4 *Judgments affirmed.*

Mass.App.Ct., 2002.

Com. v. Cruz

54 Mass.App.Ct. 1112, 766 N.E.2d 128 (Table), 2002 WL 563607 (Mass.App.Ct.) Unpublished Disposition

END OF DOCUMENT

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